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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
LONG ISLAND OFFICE

-----X Docket#
 UNITED STATES OF AMERICA, : 15-cr-00242-JFB
 :
 - versus - : U.S. Courthouse
 : Central Islip, New York
 :
 MICHAEL BELFIORE, : February 27, 2019
 Defendant : 12:25 PM
 -----X

TRANSCRIPT OF CRIMINAL CAUSE FOR ORAL ARGUMENT
 BEFORE THE HONORABLE JOSEPH F. BIANCO
 UNITED STATES DISTRICT JUDGE

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1 THE CLERK: Calling case 15-cr-242, United
2 States of America v. Belfiore.

3 Counsel, please state your appearances for the
4 record.

5 MR. KING: Good afternoon, your Honor.

6 Bradley King and Charlie Rose on behalf of the
7 United States.

8 THE COURT: Good afternoon.

9 MR. ROSE: Good afternoon.

10 MS. ALDEA: Good afternoon, your Honor.

11 Donna Aldea and Bruce Barket on behalf of Dr.
12 Belfiore.

13 THE COURT: Good afternoon.

14 MR. BARKET: Good afternoon.

15 THE COURT: Good afternoon. And Dr. Belfiore
16 is present, as well.

17 We scheduled this for argument on the Rule 33
18 motion, so I have reviewed the papers. This is the
19 opportunity that I give to the attorneys to highlight
20 anything they want to highlight from their papers, and I
21 may have some questions for you.

22 So it's the defendant's motion, so Ms. Aldea,
23 you get to go first.

24 MS. ALDEA: Your Honor, just in terms of things
25 to highlight knowing that you've reviewed the papers

Proceedings

1 here, one thing that I would like to highlight really has
2 to do with respect to the plea on the question of whether
3 there's enough information before this Court now to
4 simply grant the motion without a hearing or whether a
5 hearing is required. And I really do think that those
6 are the only two options based on the record that has
7 been presented here.

8 Right now, based on the record as it stands,
9 the government's main position with respect to the
10 absence of ineffective assistance of counsel in Mr.
11 Liotti's counsel to Dr. Belfiore to reject the plea offer
12 that had been offered, really is on the prejudice prong
13 and what the government argues is that the insistence,
14 Dr. Belfiore's insistence on innocence throughout this
15 shows that he would not have taken the plea in any event,
16 and therefore there can be no prejudice from the advise.

17 And that's actually wrong for three reasons
18 that I think are underscored by the record here. The
19 first thing, which is really important here is that there
20 -- all of the interviews that the government relies on,
21 all of the information that the government relies on to
22 show this insistence on innocence, really happens after
23 Mr. Liotti got involved in this case.

24 Prior to that point, the record in this case as
25 the government itself concedes, show that Dr. Belfiore

Proceedings

1 was wrapping up his medical practice, was in the process
2 of closing it, and was prepared to, in fact, accept a
3 plea.

4 Additionally, the second thing is the
5 government focuses on the fact that there are numerous
6 cases that they highlight in their papers that talk about
7 a defendant's adherence to a position of innocence or
8 adherence to factual innocence being a basis to find that
9 a defendant could not have entered a plea, and therefore
10 there would be no prejudice.

11 However, all of those cases deal with cases
12 where the defendant has said from a factual standpoint
13 that he did not participate in the crime.

14 So in other words, in some of the cases, some
15 of them are homicide cases where the defendant says I
16 didn't actually stab the person, I didn't actually murder
17 the person, I didn't do this.

18 In this case, we have a very different
19 situation from every single one of those because Dr.
20 Belfiore never contested from a factual standpoint that
21 he prescribed all of the pills of oxycodone that were
22 charged by the government.

23 The only question here really had to do with
24 whether there was a legitimate medical purpose, and that
25 is a legal term of art where counsel's advice is

Proceedings

1 particularly important to a defendant making a decision
2 about whether or not to accept a plea offer.

3 On this record, Mr. Liotti's advice that there
4 was no reason to take a plea which is what Dr. Belfiore
5 affirmed, and what this record shows, that Mr. Liotti had
6 told him that he could win this at trial. In fact, Mr.
7 Liotti is in his submissions to this Court, following the
8 submission of this motion, maintains that he did actually
9 win this case at trial, hands down, I think is the exact
10 quote.

11 So on this record, you have an attorney who was
12 objectively unreasonable in advising his client that this
13 was a case where there would be under this term of art a
14 legitimate medical purpose on this record.

15 And I would analogize this issue to *Lafler v.*
16 *Cooper*. In that case, the United States Supreme Court
17 was faced with a situation where a defendant's decision
18 not to take a plea was based on his attorney's advice
19 that the government would not be able to prove
20 intentional murder, the element of intent, because he had
21 shot the victim underneath the waist, below the waist.

22 And in that case what the Supreme Court found,
23 ultimately the government wound up conceding the
24 performance prong of the inquiry because the attorney's
25 advice was objectively unreasonable because it was not

Proceedings

1 based on an understanding of the law.

2 In this case, Mr. Liotti's advice about their
3 being a legitimate medical purpose about being able to
4 defeat all of these charges was based on only two
5 defenses that he proffered at trial; one of them was an
6 entrapment defense, and the other one was the "Big
7 Pharma" defense, the defense that the pharmaceutical
8 companies were to blame.

9 Just as in Lafler, the attorney's advice was
10 objectively unreasonable because it was legally incorrect
11 to advise the client that he can't be found guilty of
12 intentional murder because of the place that he shot the
13 victim, and therefore should reject the plea offer. So
14 too in this case, Mr. Liotti's advice was objectively
15 unreasonable for the same reasons.

16 Specifically, with respect to the entrapment
17 defense, the record in this case including the Rule 29
18 submission that Mr. Liotti gave, and the record in the
19 transcript, shows that Mr. Liotti really did not know or
20 understand what the entrapment defense was, and proceeded
21 at all times with the belief that proffering that
22 entrapment defense was not going to open the door to all
23 of the really devastating BNE (ph.) evidence that came
24 in.

25 On the point of how devastating the BNE

Proceedings

1 evidence is, I am actually going to refer to Mr. Liotti's
2 own motion. In his Rule 29 motion, he specifically talks
3 about the fact that the BNE evidence was prejudicial and
4 was devastating to his client's case.

5 Now the reason that he believed that the door
6 would not be opened in spite of your Honor's admonitions
7 on the record that this would likely open the door, was
8 because he had a legal understanding that he stated on
9 the record that what would be required to show pre-
10 disposition was pre-disposition of criminality, in
11 addition to just pre-disposition to prescribe the
12 medication.

13 And that view was actually affirmatively wrong
14 and contrary to case law. In fact, there were two cases
15 that had been expressly -- that had been decided by the
16 Second Circuit that had expressly rejected that
17 understanding.

18 So when we talk about whether Liotti was
19 effective or whether he had some strategic basis to
20 inform his client that he would be acquitted at trial or
21 that he had a good chance of success, or that there was
22 no reason to take the plea, we have to look at the
23 background of what his legal understanding was to give
24 that advice.

25 It's not enough to say that Liotti believed it

Proceedings

1 because the attorney in Lafler also believed that his
2 client could not be convicted of intentional murder where
3 he shot the victim below the waist.

4 What is required is that the attorney's advice
5 not be based on just some belief or some opinion of a
6 strategy but be based on a legitimate reasonable strategy
7 which can only be made under Strickland if the attorney
8 bases it on a knowledge and a research of the law and of
9 the facts at issue in the case.

10 So Mr. Liotti's advice on the entrapment
11 defense, which was one of the primary defenses was
12 incorrect. His assessment that he could win this trial -
13 - in other words, that he could do better than just a
14 plea to one solitary count of distribution, which is all
15 that the government -- all that Dr. Belfiore had to plead
16 guilty to under the government's plea offer, was
17 objectively unreasonable where it was based on a
18 misunderstanding of the laws that related to entrapment,
19 a misapprehension that he would not be opening the door
20 to the devastating BNE evidence, and that advice, that
21 assessment, was based on a fundamental lack of research
22 and knowledge of controlling Second Circuit case law.

23 With respect to the Big Pharma defense, which
24 was his only other defense, again I am actually going to
25 underscore the ineffectiveness based on Mr. Liotti's own

Proceedings

1 submissions to this Court.

2 With respect to that, he actually states that
3 his Big Pharma defense, this is in the affidavit that he
4 submitted to this Court arguing against the granting of
5 this Rule 33 motion, he actually states that this Big
6 Pharma defense was nothing more than an attempt at jury
7 nullification.

8 If the attorney's central defense in a case
9 where he has told his client there is no reason to accept
10 a plea deal, fire your prior attorney because all he
11 wants you to do is settle the case. That's all he knows
12 how to do. Retain me, go to trial because that's what we
13 have on this record. If that's based on nothing more
14 than a belief that there might be jury nullification,
15 there is no way that that strategy or that advice can be
16 deemed legitimate or can be deemed reasonable under
17 Strickland.

18 And so those are the facts that I want to
19 highlight here. This is not a case where we have a
20 client who was not willing to admit his factual guilt.
21 This is a client who admitted all of the instances, the
22 factual instances of prescribing oxycodone on all of the
23 occasions charged by the government.

24 This is not a case where there is a client who
25 was unwilling to give up his medical license or close his

Proceedings

1 practice, and therefore no prejudice can be found. This
2 is a client who was in the process of closing his
3 practice, of wrapping it up, of trying to sell it, and
4 had affirmatively stated on the record, in fact the
5 government had stated on the record affirmatively on
6 multiple occasions, at multiple appearances, that he was
7 prepared to take the plea, and was just wrapping up the
8 medical practice.

9 So on this record, what we have us a client who
10 is going to take the plea, who made the mistake of
11 meeting with a lawyer who sold him a bill of goods that
12 was frankly false. It was false at the time that he made
13 it.

14 And on performance with respect to Strickland
15 on that aspect, the government highlights throughout its
16 brief, throughout its submissions, that Mr. Liotti told
17 Dr. Belfiore that he had a thirty percent chance of
18 success at trial which the government highlights, means a
19 70 percent chance of being convicted.

20 That's actually inaccurate. The affidavit in
21 this case which is not contested by Mr. Liotti in any way
22 in his submission actually states that at the very first
23 meeting -- now this would be before Mr. Liotti looked at
24 the record, before he looked at any evidence in the case,
25 before he did any legal research, what he actually told

Proceedings

1 him is he gave him an assurance of a win at trial, and at
2 the first meeting, he urged him to fire Mr. Gann, hire
3 him, and take the case to trial. He disparaged Mr. Gann
4 by saying all attorneys like Gann do is settle.

5 He talked about suing Mr. Gann because he
6 didn't do anything, and he assured me says Dr. Belfiore
7 in his affidavit, at paragraph 5, that he would not even
8 accept the case unless he believed there was at least a
9 30 percent chance of being acquitted.

10 Those types of representations cannot be deemed
11 strategy. They can't be deemed legitimate strategic
12 advice or legitimate strategic beliefs when they're based
13 on a first meeting at which the attorney has not reviewed
14 any of the law, and has not reviewed any of the record.

15 In fact, what they actually suggest is a very
16 disturbing suggestion that this was really just about
17 getting a retainer at that point, which is contrary to
18 the duty of loyalty that attorneys owe to their clients
19 as recognized by the Supreme Court in Strickland.

20 Additionally, that at least 30 percent chance,
21 did not remain at least a 30 percent chance because as
22 Mr. Liotti obtained more evidence, and discovery, and the
23 file from prior counsel, and began to research the case,
24 his assessment about the chance of success in this case,
25 only grew. In fact, later on, Mr. Liotti according to

Proceedings

1 Dr. Belfiore, told him "there is no reason to take a
2 plea". This is after the government had indicated that
3 they were going to charge the death resulting counts
4 which would carry mandatory minimum sentences. "No
5 reason to take the plea".

6 He also assured Dr. Belfiore at that point, "We
7 can win this," and "I can do this". And while the
8 government says that these statements should not be
9 believed on this record because they're self-serving and
10 being made by a defendant who is unworthy of belief, I
11 submit that on this record, there is nothing that would
12 suggest to this Court that those statements are not
13 absolutely true.

14 All of Liotti's submissions following this date
15 are in keeping with this. He submitted letters to this
16 Court, and affidavits to this Court in which he attests
17 not only that he could have won this or should have won
18 this trial, but that he's dumbfounded, "that he's
19 perplexed", "that he actually did win this hands down",
20 and that's he convinced that this Court will grant his
21 Rule 29 motion which notably doesn't even state the
22 correct legal standard or any legal standard at any point
23 in that submission and is absolutely convinced that if
24 this Court does not do so, then the Second Circuit or the
25 United States Supreme Court is going to find that the

Proceedings

1 Rule 29 motion should have been granted.

2 So that submission, those submissions show that
3 Dr. Belfiore's statements in his affirmation which should
4 be sufficient in terms of the performance prong to
5 require and frankly the rest of the record in terms of
6 the prejudice prong, which would be sufficient to require
7 granting this motion without a hearing, are absolutely
8 worthy of belief.

9 To the extent that any question of fact is
10 raised, it is not raised by Mr. Liotti's submissions.
11 What I would note is although Mr. Liotti has written a
12 tremendous amount, truly a tremendous amount, and has
13 submitted voluminous papers and submissions with his
14 prior victories in other cases, and other publications,
15 not once does he contest the key elements that form the
16 basis of the ineffective assistance of counsel claim on
17 the performance prong.

18 In this regard, he never challenges the fact
19 that he advised Dr. Belfiore at the first meeting that he
20 should fire Gann and not take the plea and proceed to
21 trial. He never once contests that he advised Dr.
22 Belfiore that they could win this, and that they should
23 win this. He never does that.

24 Instead, all he avers is that he warned Dr.
25 Belfiore of the risks of going to trial. But warning a

Proceedings

1 client of the risk, in other words, what his sentence
2 exposure would be, is not sufficient to constitute
3 effective performance under Strickland's performance
4 prong.

5 And again, I cite to Lafler v. Cooper with
6 respect to that which makes it clear that when an
7 attorney gives objectively unreasonable advice based on
8 the controlling law, and the controlling facts of a case,
9 then that advice cannot be deemed strategic, and cannot
10 be deemed reasonable.

11 THE COURT: Well, let me ask you, and thank you
12 for that summary, that was very thorough, I just want to
13 focus on the prejudice prong first --

14 MS. ALDEA: Yes.

15 THE COURT: -- then I will go into the
16 performance prong but on the prejudice prong, you said in
17 your papers, and I think you repeated today that he was
18 ready to plead until he had that meeting with Mr. Liotti.
19 But I don't know that the record establishes that he was
20 ready to plead. I understand that he waived indictment,
21 which is some indication that he intends to plead but if
22 you actually look at the record in this case -- first of
23 all, we have nothing from Mr. Gann, who was representing
24 him at the time. You haven't put in a declaration from
25 Mr. Gann saying Dr. Belfiore was, you know, on day one or

Proceedings

1 at any point ready to plead. He was just wrapping up his
2 affairs. The record shows, at least in my experience, an
3 unusually long time -- usually my cases a defendant
4 waives indictment, pleads guilty, at that moment, maybe a
5 few weeks later here, and we've got the unusual situation
6 where he was charged in a complaint in 2014, that gets
7 dismissed, I guess, and then ultimately he does waive
8 information.

9 So I am not sure exactly what went on in that
10 several-month period between October 2014, and May of
11 2015, but I do know what went on from May of 2015 to
12 October when he first met with Mr. Liotti, which is
13 multiple times they went before Judge Seybert, who had
14 the case at the time, and Mr. Gann kept asking for
15 adjournments, saying something along the lines of what
16 you're saying, that he is wrapping up his affairs.

17 But that's also consistent potentially, with
18 someone who is not in the frame of mind where they're
19 ready to plead guilty or not. So that's -- I think
20 there's an ambiguity in the record, and I actually looked
21 at Dr. Belfiore's declaration and he actually doesn't say
22 when Mr. Gann -- he explains that Mr. Gann told him that
23 he thought he was going to lose, and that he shouldn't go
24 to trial, but in paragraph 4, Dr. Belfiore says during
25 the period of time, I was considering accepting the plea,

Proceedings

1 I had a conversation with Liotti's son.

2 So nowhere in Dr. Belfiore's affidavit does he
3 say based upon Mr. Gann's advice, I was completely on
4 board, I was ready to take the plea. He kind of create
5 -- he says I was considering. So I don't know what your
6 response is to that. Why should I conclude that just
7 because he waived indictment at some point, that during
8 that many month period where Mr. Gann kept putting it
9 off, that he was ready to plead.

10 MS. ALDEA: So I think the answer to that is, I
11 guess --

12 THE COURT: That was a long question but --

13 MS. ALDEA: That's okay, I will give a long
14 answer. The answer to that is actually threefold. The
15 first answer is that based on the record that we have,
16 and you're right, we don't have an affidavit from Mr.
17 Gann with respect to what their conversations were during
18 that period, but as an officer of the court, Mr. Gann did
19 represent in three of the court appearances that are
20 attached to the government's papers, I think it's in
21 Exhibit B -- wait, no, no, no. It's in here. I am
22 sorry. In Exhibit B, which is the court appearance of
23 January 30th, 2015, in Exhibit C, which is the court
24 appearance of March 27th, 2015, in Exhibit D, which is
25 the court appearance of July 24th, 2015, that your Honor

Proceedings

1 alluded to. Mr. Gann does state explicitly as an officer
2 of the court that Dr. Belfiore is wrapping up his
3 practice and is prepared to take the plea -- is preparing
4 to take the plea.

5 More than that, I believe that that was also
6 communicated to the government, and was their
7 understanding because the AUSA also states on the record
8 that she believes that that's what's happening.

9 So I would rely on that --

10 THE COURT: Yeah, but I --

11 MS. ALDEA: -- factually.

12 THE COURT: I did look at that but again, I
13 don't think it's quite as clear as you're saying. I
14 think consistent with being an officer of the Court, Mr.
15 Gann -- Dr. Belfiore could have been telling Mr. Gann I'm
16 having, you know, thoughts about whether I should plead
17 guilty or not.

18 Mr. Gann just kept saying, you know, we're
19 close to having resolved this matter short of trial. He
20 does relate to winding down his practice but I didn't see
21 any comments from Mr. Gann that said your Honor, my
22 client definitely is going to plea here. I mean, I do
23 have lawyers that say that to me. He's definitely
24 pleading, we just have one last thing we need to do. It
25 seems like it may be. And good -- it's ambiguous, but

Proceedings

1 one inference you could draw from this is then when Dr.
2 Belfiore was informed that as a result of his plea, that
3 he could never practice again, that maybe that became a
4 sticking point for him, the idea that he was never going
5 to be able to a doctor again. Maybe he didn't fully
6 understand that when he waived the indictment, I don't
7 know.

8 But I just think it's ambiguous that all this
9 time went by, Mr. Gann's asking for multiple
10 adjournments. I don't know anything -- there was nothing
11 in here that led me to believe that Mr. Gann again hasn't
12 put anything into saying Dr. Belfiore told me from day
13 one to the last day I represented him, he was always
14 going to plead. There's nothing like that.

15 MS. ALDEA: Yeah, I don't -- well, the second
16 answer to your Honor's question is that I don't believe
17 that it's legally required for purposes of establishing
18 prejudice in this context that there be that kind of
19 declaration.

20 THE COURT: No, I am being extreme about it. I
21 agree with you.

22 MS. ALDEA: Yes.

23 THE COURT: But it's also one piece of -- the
24 second piece that I was going to get to which relates to
25 this same issue, again prejudice is -- you said well,

Proceedings

1 this isn't a factual innocence situation. But it is
2 actually a factual innocence situation because even
3 though he wasn't disputing that he prescribed the
4 oxycodone, one of the elements of this crime is that he
5 has to -- good faith is a defense. Good faith -- it has
6 to be shown that he didn't believe it was for a
7 legitimate medical purpose.

8 So if Dr. Belfiore were going to plead guilty
9 to this, one of the elements -- he just can't say yes, I
10 distributed oxycodone and it caused the death of these --
11 well, that wouldn't have been part of the plea, it would
12 have been just distribution but he has to allocute that
13 when I prescribed those things, I did not believe they
14 were for a legitimate medical purpose.

15 So that -- and he -- you weren't here for the
16 trial but I am sure you reviewed the transcript, he
17 testified unequivocally at the trial, under oath, that he
18 believed that this was for a legitimate medical purpose.

19 So that's something that has to be addressed
20 because for him to plead, he would have had to say the
21 exact opposite. So this is not a situation where as you
22 point out, someone because of whatever the lawyer is
23 telling him, could remain silent, make the government go
24 through the burden of proving it.

25 Here you had someone who took the stand, and

Proceedings

1 testified to something completely inconsistent with being
2 able to plead guilty. So I don't know what your response
3 is to that.

4 MS. ALDEA: So my response to that, and this
5 actually ties into the prior answer as well, in his
6 affidavit what he actually states, and this is what is
7 legally required in terms of establishing prejudice, at
8 paragraph 11, Dr. Belfiore states that "I have been told
9 by Mr. Liotti that my chances of prevailing at trial were
10 actually slim, and that the proof against me was
11 overwhelming. The very advice Mr. Gann gave me, I would
12 have certainly taken a plea."

13 And that, coupled with the incredible
14 sentencing disparity is legally sufficient under the case
15 law to establish prejudice. The government acknowledges
16 that standard as well, and there's submissions.

17 In further answer to your Honor's question,
18 this question of what a legitimate medical purpose is, is
19 just as in Lafler, defined by what the attorney explains
20 it to be.

21 So when we look at what Mr. Liotti believed,
22 Mr. Liotti stated, and I believe this is consistent as
23 well with Dr. Belfiore's testimony at trial, that as long
24 as the defendant is being told by his patient, that the
25 patient is in pain, and as long as the prescription on

Proceedings

1 the bottle, the instructions on the bottle say take the
2 pill this way, it's out of his hands, whether the patient
3 is lying, or whether the prescription instructions, the
4 way that the instructions are written are not being
5 followed.

6 So the advice that he was being given, and
7 again, this is clear from Mr. Liotti's arguments on the
8 record in the transcript, is that a legitimate medical
9 purpose only requires that. It requires a patient to
10 tell you that I am in pain, and it requires the
11 instructions on the bottle to be written in a way so that
12 if they're complied with, it can only be legitimate.

13 And that frankly just as in Lafler, the
14 attorney's advice of it can never be intentional murder
15 as long as you shoot below the way, is objectively wrong.
16 That's simply not the way the courts have defined
17 legitimate medical purpose, and frankly, it's simply an
18 unreasonable view of what legitimate medical purpose is.
19 It's not enough.

20 In this case, a competent attorney, and I
21 believe on the affidavit at least, Gann certain told him
22 that the evidence against him was overwhelming. A
23 competent attorney would have said look, we've got
24 videotapes here. We're not talking about even the death
25 counts right now. We're talking about the advice of

Proceedings

1 reject a guilty plea to one single count of illegal
2 distribution of oxycodone. One single count in all of
3 the counts with the undercover officer would have been
4 the single prescription when Dr. Belfiore told -- the
5 undercover came in, and actually told him that he was
6 giving the drugs to his girlfriend and Dr. Belfiore still
7 filled that prescription.

8 A competent attorney would have told him here's
9 the video, here's the evidence, here's what it shows,
10 that you had drug testing on that date, and on that one
11 sole date during that drug testing, he came in, he had
12 not been taking the oxycodone, his drug tests showed
13 conclusively that he had no oxycodone in his system which
14 smells of diversion, and he explicitly told on videotape,
15 told Dr. Belfiore, that he was giving drugs to his
16 girlfriend, which is clearly diversion.

17 A guilty plea to that count, your Honor, would
18 have been easy because Dr. Belfiore would have only had
19 to admit that on that one occasion, on that one count,
20 there was not a legitimate medical purpose.

21 So I vehemently disagree that he could not have
22 allocuted to this. He didn't have to allocute to the two
23 death counts. They weren't even on the table. He didn't
24 have to allocute to the other 28 or however many there
25 were, charges of illegal distribution; just to that one

Proceedings

1 sole count.

2 MR. BARKET: One second, Judge.

3 (Counsel confer)

4 THE COURT: But even on that one count, he --
5 go ahead, state your point because I don't want you to
6 forget.

7 MS. ALDEA: Yeah, I mean since he just told me.
8 And the other point on that actually is that at trial,
9 and during his testimony, he never even spoke to that.
10 He never even addressed that.

11 So your Honor's point about his testimony being
12 contrary to an admission of guilt, it was not contrary to
13 the admission of guilt with respect to the prescription
14 to that undercover officer.

15 THE COURT: Yeah, I would have to go back and
16 look at that but my memory is that overall, he testified
17 that he prescribed to all of his patients it was always
18 because he believed it was for a legitimate medical need,
19 and I -- maybe I am wrong, maybe he wasn't asked that on
20 the particular -- with respect to the undercover, but I
21 am pretty confident that he said something along those
22 lines.

23 MR. BARKET: No, it was --

24 THE COURT: No?

25 MR. BARKET: -- and it was actually one of the

Proceedings

1 points in the government's summation that he avoided
2 testifying about the prescription to the undercover
3 officer. They highlighted that in their rebuttal, that
4 he didn't deny it, he didn't testify to it at all --

5 THE COURT: Okay.

6 MR. BARKET: -- didn't even talk about it in
7 his summation.

8 THE COURT: I will go back and look at that.

9 MS. ALDEA: So, your Honor, I do think that it
10 actually does have to do with the way that the term
11 legitimate medical purposes defined him, and his
12 understanding of the legal requirements of that.

13 THE COURT: The only other -- and you jumped a
14 little bit to performance, and you keep talking about
15 Lafler, but Lafler, it was a legal error by the lawyer,
16 pure legal error.

17 Here, it's a q of whether or not the proof that
18 Dr. Belfiore had was going to be sufficient or not, you
19 know, or poking holes in the government's case was going
20 to be sufficient, but one thing you're leaving out is I
21 mean he had three experts, two on causation with respect
22 to the deaths, but he also had an expert who was backing
23 up what Mr. Liotti said. He had an expert who basically
24 said that what Dr. Belfiore did here was consistent with
25 customary medical practice and deemed for legitimate

Proceedings

1 medical purpose.

2 So this wasn't something that Mr. Liotti just
3 argued to the jury, and had nothing to support it. He
4 had both the expert -- and obviously Dr. Belfiore
5 testified himself to that. So you haven't really
6 mentioned that but isn't that significant, that he had an
7 expert with a lot of credentials who sat in that chair
8 right there, looked that jury in the eye, and said that
9 this is consistent with a legitimate medical purpose.

10 MS. ALDEA: Well, the --

11 THE COURT: Why isn't that significant? Mr.
12 Gann didn't have that, I don't think. So that was
13 something Mr. Liotti was able to get that was certainly
14 helpful for Dr. Belfiore.

15 MS. ALDEA: Again, the question of whether the
16 advice was reasonable has to do with what was on the
17 table at the time. So the advice that was given was go
18 to trial, there's no reason to take this plea to the
19 single count, which is why I am focusing on the
20 undercover because the expert, no expert testified that
21 it was a legitimate medical purpose or in keeping with
22 common medical practice to prescribe drugs to people who
23 you know, who have admitted to you that they're diverting
24 the drugs.

25 So in order for Mr. Liotti's advice to have

Proceedings

1 been constitutionally effective or for there not have
2 been prejudice here, what would need to be shown is that
3 not only could he have -- that he had a reasonable belief
4 that not only could he have gotten Dr. Belfiore acquitted
5 of the two death resulting counts, not only could he have
6 gotten him acquitted of all of the other twenty-something
7 counts of illegal distribution, but he wouldn't even be
8 convicted of a solitary one.

9 And that's why I think the undercover's
10 testimony is so essential here, and the fact that it
11 wasn't met at all by the proof, also speaks to the
12 ineffectiveness.

13 I focused on the plea but part of -- there is
14 kind of some overlap here with respect to the
15 ineffectiveness at trial, as well, in the sense that
16 although Mr. Liotti put Dr. Belfiore on the stand to
17 testify, he never had Dr. Belfiore testify to some of the
18 critical things that really established, I think, the
19 government's case.

20 Number one, he never testified about the
21 diversion. He never testified how he could continue to
22 prescribe drugs to a patient who not only did not have
23 the drugs in his system, but more than that, who had
24 actually admitted on the record, that he was diverting
25 the drugs, that he was giving them to his girlfriend.

Proceedings

1 That's the first thing, and that's the strongest one,
2 which is why I keep focusing on that because that's the
3 sole conviction that meant he should have taken the plea
4 because he can't possibly do better if he went to trial.

5 The second thing though is that he also did not
6 prepare Dr. Belfiore to testify to the alterations in the
7 medical record. To have a legitimate medical purpose,
8 and all of the experts that testified at trial
9 acknowledged, there need to be tests that are done.

10 In this case, the patients did not have MRIs,
11 did not have x-rays, did not have any kind of medical
12 documentation showing that there was an underlying
13 injury.

14 Moreover, the videotaped interactions with the
15 undercover officer actually showed on this record that
16 that undercover officer's chart indicated that there were
17 certain tests that were done that actually, in fact, we
18 know from the videotapes, were never performed. So there
19 were falsification in the records.

20 Mr. Liotti put Dr. Belfiore on the stand,
21 really? I mean frankly, I can't put it any other way
22 than it was a lamb to the slaughter because he didn't
23 prepare him to deal with those portions of the
24 government's cross or those portions of the government's
25 case. And that is very ineffective.

Proceedings

1 And I would note, I don't want to harp too much
2 on the psychic, although I can't ignore the psychic, I
3 would note that these critical decisions that were being
4 made, including the question of whether Dr. Belfiore
5 should testify at all, given the record in this case,
6 given the interviews, given the media coverage, given his
7 statements in the media, and the grand jury, they could
8 all be used against him, if he took the stand.

9 That decision was made precisely at the time
10 that Mr. Liotti was consulting with the psychic for 30-
11 minute intervals, every single day, sometimes more than
12 once a day.

13 So to say that that strategic decision is not
14 being influenced based on or is being made based on a
15 reasonable or a legitimate strategic decision or
16 assessment of the facts is just not reasonable on this
17 record, where it's being tainted, and it's being colored
18 by all of these things.

19 Additionally, your Honor, I think that another
20 problem with this is that Mr. Liotti in his own summation
21 never addressed the question of the diversion, never
22 addressed the question of why the charts were showing
23 falsifications, in other words, tests that were done that
24 really weren't done, all of that was ignored in Mr.
25 Liotti's summation.

Proceedings

1 And I think his only strategy based on this
2 record, and your Honor actually knows this better than I
3 do, but his only strategy seems to have been to combat
4 all of the charges with respect to the undercover, not
5 with expert testimony, because he couldn't do that,
6 because clearly there was no legitimate medical purpose
7 with respect to the undercover charges but rather to
8 combat it based on the entrapment defense.

9 And the problem with that, and this is why I
10 mentioned Lafler, the problem with that is that Mr.
11 Liotti's understanding of the entrapment defense was
12 legally wrong. He did not understand that the entrapment
13 defense was going to open the door to BNE evidence that
14 showed predisposition in the sense that it showed that --
15 well, it actually proved the government's case, I would
16 argue, because the government's case was that this wasn't
17 a doctor, this was a drug dealer.

18 And instead of having just a couple of isolated
19 incidents that were contested at trial, Mr. Liotti's
20 decision with respect to this entrapment defense which
21 was facially meritless, there was no chance with this
22 record, with this video surveillance, that showed that
23 the undercover was really not trying to convince Dr.
24 Belfiore to prescribe the drugs at all. It was pretty
25 easy to get the prescription.

Proceedings

1 There's no reasonable way that a competent
2 attorney could have got into that in the way that Mr.
3 Liotti did, opening the door to this BNE evidence that
4 showed that these isolated cases were not isolated, but
5 in fact, were part of 6,000 prescriptions over the course
6 of a three-year-period. 600 30 milligram pills of
7 oxycodone, or more than that being prescribed over the
8 course of less than a three-year period.

9 And on top of that, the fact that all of these
10 prescriptions were creating or forming a larger, and
11 larger percentage of Dr. Belfiore's medical practice even
12 as the knowledge in the community of the harmful impact
13 of oxycodone was growing.

14 And on that point, because it ties in, the
15 other defense that was posited here with respect to Big
16 Pharma was also devastating. It wasn't just a defense
17 that was rejected by the jury, similarly to the
18 entrapment defense, it was affirmatively harmful because
19 the Big Pharma defense was actually used by the
20 government affirmatively to destroy Dr. Belfiore's
21 credibility when Dr. Belfiore went on the stand.

22 And the main reason he was put on the stand was
23 to play these videotapes from the 1990s and from 2000,
24 showing that Big Pharma had or that Purdue
25 Pharmaceuticals had a media campaign to show that

Proceedings

1 oxycodone was actually safe, and was not addictive.

2 The problem with that is that this so-called
3 strategy two could not have been based on any research,
4 any minimal amount of research or diligence in looking at
5 the facts of this case. Not only would any amount of
6 minimal research or diligence have revealed that, in
7 fact, Purdue Pharma in 2007 which is years before the
8 allegations of this case was held criminally responsible
9 for its actions, but on top of that, and I think even
10 more devastatingly, Mr. Liotti's central defense, he was
11 arguing out of both sides of his mouth.

12 On the one hand, he was saying put Dr. Belfiore
13 on the stand to testify that there was no way that he
14 could have known that he had this legitimate medical
15 purpose because he didn't believe that these drugs were
16 addictive, he didn't believe that these drugs were
17 harmful, he had been misled by Big Pharma in this regard,
18 but at the same time, there were records that were put in
19 evidence with which Dr. Belfiore was devastatingly
20 attacked on cross-examination showing that in his
21 practice, his own pain management contracts, specifically
22 spelled out the fact that these drugs were addictive, and
23 that they were dangerous in 2011, in 2012, in 2013, which
24 were ten years after the videos that Mr. Liotti put into
25 evidence, and which were at the time of the alleged

Proceedings

1 criminal charges.

2 Moreover, there was a video where the other
3 undercover officer, I believe it was Undercover O'Toole
4 (ph.), the female undercover officer, was being
5 interviewed by, and Dr. Belfiore explicitly told her that
6 these drugs are addictive, and that they're dangerous,
7 and that she shouldn't take them.

8 So his central defense was confused. It was
9 not based on a legitimate strategy which is what is
10 required or a reasonable strategy, it was based frankly
11 from my reading of the record, and I know that I wasn't
12 here, and I'm probably at the greatest disadvantage in
13 that regard, but from my reading of the record, it
14 frankly seemed that Mr. Liotti had no idea what was in
15 the pain management contracts. He had no idea that that
16 was going to come out because when it did, there was
17 simply no way to deal with them.

18 And they confused his central defense in a way
19 that affirmatively destroyed Dr. Belfiore's credibility
20 in front of this jury. So, you know, I don't want to --
21 I guess it's sort of ironic, they say with doctors, the
22 first thing is do no harm. Well, with lawyers, I think
23 that's true too. I think a criminal defense attorney,
24 even when presented with a difficult case, has to in the
25 first place, do not harm.

Proceedings

1 In this case, the defenses, the two central
2 defenses, entrapment, and the Big Pharma defense were
3 defenses that were based on a misunderstanding or a lack
4 of knowledge of the law, a lack of knowledge of the
5 operative facts, and that were not just rejected but that
6 did harm, affirmatively did harm, to Dr. Belfiore and
7 affirmatively helped the government prove the central
8 elements of its case, which is that this was not an
9 isolated incident, this was not a legitimate medical
10 purpose because this was part of a drug operation.

11 Their quote that they stated repeatedly, I
12 think I cited it in I don't know, twenty different ways
13 in twenty different pages, was that this was not a
14 doctor, this was a drug dealer.

15 And it was Mr. Liotti, who more than anything
16 else, furnished proof of that through his choice of
17 defenses.

18 THE COURT: All right. Thank you.

19 Go ahead, Mr. King.

20 MR. KING: Your Honor, just first with respect
21 to Lafler, I think the Court has stated it accurately, is
22 totally distinguishable for the reason that it wasn't
23 just Mr. Liotti's opinion. His central argument here was
24 that there was a legitimate medical purpose. He
25 proffered expert testimony from Dr. Olsen (ph.) on that

Proceedings

1 point with respect to not only the decedents but also the
2 undercover. Dr. Olsen testified that the prescriptions -
3 - his review of the medical records established that it
4 was legitimate to prescribe those drugs, that oxycodone
5 to the undercover.

6 The other point here is that on the performance
7 prong, when your Honor was making the point about the
8 passage of time after the plea offer was conveyed, the
9 inference to be drawn from that is that the defendant was
10 not satisfied with the plea offer that had been conveyed.
11 That is in fact what is set forth in Mr. Liotti's
12 affirmation at paragraph 6. He says that Dr. Belfiore
13 came to him after being dissatisfied with the pedestrian
14 manner in which he was being represented by Marc Gann.

15 Ultimately, as the Second Circuit has
16 repeatedly stated, the decision whether or not to plead
17 guilty is the defendant's decision. Counsel has a duty
18 to advise the defendant of the parameters of a plea
19 offer, and also to consider the defendant's desire in
20 this case, to put the government to its proof and to
21 avoid collateral consequences which the record also shows
22 that defense counsel investigated with civil counsel for
23 the defendant over a course of at least several months
24 after he was retained.

25 Ultimately, he concluded that although trial

Proceedings

1 would be difficult, the defendant's desire to retain his
2 medical practice required that the defendant proceed to
3 trial and that's what happened here.

4 It's also important to note that the defendant
5 could not have allocuted to this because he repeatedly
6 stated under oath in the media, that he did not do
7 anything wrong, that he had not issued any prescriptions
8 solely to make money, and not for a legitimate medical
9 purpose. So he wouldn't have been able to allocute.

10 The other point to be made on that is that
11 while defense counsel made a point that he could have
12 allocuted because there have been diversion to his
13 girlfriend that diversion related to the third visit, not
14 to the sixth visit.

15 And also, the defendant's point with respect to
16 the sixth visit was that this was the point at which he
17 had become aware of what was going on, and he issued the
18 prescription legitimately, with an effort to check
19 through a pharmacist calling him as to whether or not his
20 patient was complying with his instructions. So he
21 wouldn't have been able to allocute under any count of
22 the indictment.

23 THE COURT: Well, let me ask you one of their -
24 - I guess their more basic argument is that the Court
25 should have a hearing that this shouldn't be decided

Proceedings

1 based upon the papers and in terms of what the hearing
2 would entail.

3 You know, certainly I know what Dr. Belfiore's
4 position was based upon what his testimony was at the
5 trial, but one of their arguments is is that -- basically
6 that Mr. Liotti persuaded him, that he wanted to plead
7 guilty, was ready to plead guilty, and that it was Mr.
8 Liotti who persuaded him otherwise. And why isn't it at
9 least -- the ability at least on that particular piece to
10 develop the record from a more factual matter? All these
11 other issues that are raised, obviously I sat through the
12 trial. I can assess the performance of the attorney in
13 terms of what they did, what defenses did or did not make
14 sense. We don't need a hearing for that but on this
15 issue of -- this would go to the prejudice prong, whether
16 in fact, Dr. Belfiore was ready to take a plea, and it
17 was only Mr. Liotti who talked him out of it, or whether
18 or not as you're suggesting, he was already having cold
19 feet, and was not prepared to plead guilty, was not
20 prepared to lose his medical practice, and then found an
21 attorney who was willing to sort of support that state of
22 mind that he already had.

23 Why wouldn't we have a hearing on that where
24 Dr. Belfiore could testify, maybe Mr. Gann could testify.
25 I don't even know -- maybe the AUSA, was it Ms. Gatz? I

Proceedings

1 don't even know -- was it Ms. Gatz?

2 MR. KING: It was, your Honor.

3 MS. ALDEA: Yes.

4 THE COURT: Maybe Mr. Gann, you know, said
5 things to her. I guess it would be hearsay but there was
6 a long period of time where Mr. Gann was just telling --
7 first it was months between the complaint and the waiver.
8 I don't know what was going on during that period of time
9 in terms of negotiation or between Mr. Gann and Dr.
10 Belfiore, and then there was this unusual many month
11 postponement after the waiver of indictment. So why
12 shouldn't that portion of the record be developed?

13 MR. KING: Your Honor, in this case there's no
14 need to develop it because you do have the defendants own
15 statements, both before the grand jury, at trial, and in
16 the media, where he unequivocally states that he cannot
17 plead guilty to something that he didn't do. And that is
18 exactly what Mr. Liotti's stating in his papers when he
19 is saying the defendant was dissatisfied.

20 The only performance that Mr. Gann had given to
21 the defendant at this time was to extract the plea
22 agreement. He couldn't allocute to it. That's why it
23 took almost eleven months before he changed counsel and
24 continued. He says this explicitly; I didn't do anything
25 wrong. I can't plead guilty to something I didn't do.

Proceedings

1 It's in the record.

2 In contrast to other cases where there may be
3 some question about what was in the defendant's mind,
4 this is there. It's absolutely there, and there's no
5 need to develop it further. Your Honor has the option of
6 taking a middle road when you're presented with a record
7 this explicit.

8 And in addition to that, I would just point out
9 that in paragraph 7 of the defendant's affirmation, he
10 doesn't say that Mr. Liotti guaranteed him that he would
11 avoid conviction. He just gave him hope that he could
12 avoid losing his medical practice. Hope is not a
13 guarantee.

14 And Mr. Liotti's initial assessment that he
15 wouldn't take the case unless the defendant had at least
16 a thirty percent chance of acquittal is a minimal hope
17 because that's saying you have a seventy percent chance
18 of being convicted.

19 In addition to that, the record is showing that
20 defense counsel with respect to what's required under the
21 law did convey the parameters of the plea agreement to
22 the defendant, did assess what the effect of taking a
23 plea would mean, and certainly had in mind the
24 defendant's desire to put the government to its proof,
25 his maintaining of his innocence which is a factor he had

Proceedings

1 to consider as counsel. That's something he had to do.

2 It's something the Second Circuit has made clear.

3 It's not simply that a plea offer appears
4 beneficial. A defendant has to affirmatively decide
5 whether to enter the plea. And here, based upon the
6 defendant's contemporaneous statements, based upon the
7 conduct that your Honor saw over many months where he is
8 not accepting a plea offer that's been made in January,
9 putting off appearances, allegedly to wind down his
10 practice, it wouldn't have taken him very long, your
11 Honor, to wind down his practice if he pleaded guilty
12 because he wouldn't have been able to practice. That
13 would have been the end of it.

14 So it rings hollow here. And in addition, you
15 have very clear, unequivocal, under oath statements,
16 statements in the media, he couldn't have pleaded guilty.
17 So there was no prejudice here.

18 THE COURT: All right. Do you want to briefly
19 respond?

20 MS. ALDEA: Yes, very briefly. The first thing
21 is that with respect to the media, the grand jury, the
22 statements at trial, I would note that all of those were
23 made, all of them were made, after Mr. Liotti entered the
24 case, and assumed the representation.

25 And so the fact that under his attorney's

Proceedings

1 advice, the client is making statements that are
2 consistent with his attorney's views about whether or not
3 he did something legally wrong, is hardly probative of
4 anything.

5 Additionally, with respect to this question
6 what the government just said, the AUSA just said that he
7 didn't do anything wrong, that Mr. -- Dr. Belfiore had
8 repeatedly said he didn't do anything wrong. This is
9 precisely the difference between all of the case law on
10 this, and this case.

11 The not doing anything wrong, wrong is a moral
12 assessment, or in this case a legal assessment. Morally,
13 Dr. Belfiore clearly did not believe that he did anything
14 wrong. He did what he thought was right, what he thought
15 he was permitted to do. And that's absolutely clear,
16 your Honor, and that's absolutely true.

17 However, as lawyers, we know what is legally
18 wrong, what legally constitutes a crime, and what Mr.
19 Gann told him was that from a legal standpoint, what he
20 did which was factually uncontested, in other words, the
21 prescription of all these drugs was legally wrong because
22 under the facts of this case, there would be no
23 legitimate medical purpose.

24 What Mr. Liotti told him is that that was
25 incorrect advice. That Gann should be sued for that

Proceedings

1 advice. That Gann should be fired for that advice. That
2 that advice should be rejected, and that he should go to
3 trial because he could do better, and that was
4 objectively unreasonable based on this record, because
5 again, this is a legal assessment and the attorney's
6 advice, as to what is wrong under the law, is the advice
7 that the client needs.

8 So when Dr. Belfiore later says I did nothing
9 wrong in the media based on his lawyer's advice, that's
10 accurate. That's accurate. But the underlying advice
11 was wrong.

12 Again, it's like the defendant in Lafler saying
13 I had no intent to kill because I shot under the waist.
14 It doesn't matter from a legal standpoint.

15 THE COURT: Well, why wouldn't a middle-of-the-
16 road approach at this point -- again, this is for
17 purposes for fully developing the record --

18 MS. ALDEA: Yes.

19 THE COURT: -- the piece that I think is
20 ambiguous is with regard to Mr. Gann and Dr. Belfiore, so
21 why shouldn't I ask Mr. Gann, and I think the laws allows
22 me to do this in my discretion, he's I think waived his
23 attorney-client privilege for purposes of this motion,
24 ask Mr. Gann to put in a declaration indicating that the
25 substance of his discussions with Dr. Belfiore and how

Proceedings

1 that ended up, why shouldn't I have him do that?

2 MS. ALDEA: Your Honor, we don't oppose a full
3 hearing on this issue. I think that in addition to just
4 the --

5 THE COURT: Why should I have a full hearing --
6 if that's the piece that needs to be developed, maybe Mr.
7 Gann puts in that declaration, Dr. Belfiore will read it
8 and agree with it. Maybe everything that Mr. Gann says
9 in that declaration, he'll say that's exactly the way it
10 happened.

11 MS. ALDEA: That's possible.

12 THE COURT: So why should I have a hearing
13 before I get that declaration?

14 MS. ALDEA: So, your Honor, I mean the first
15 thing is, and I had already answered this, but from a
16 legal standpoint, it's actually not required for the
17 purposes of establishing prejudice, that the defendant
18 was prepared at that moment, or definitively at that
19 moment, had no doubts or no hesitations about taking a
20 plea.

21 What is legally required, the legal standard is
22 that there be a statement by the defendant which in this
23 case there is, that had he been advised of the
24 consequences, he would have entered a plea, which he did,
25 and we have the record showing that he was prepared to

Proceedings

1 enter a plea.

2 But more than that, from a legal standpoint,
3 the sentencing disparity and whether the attorney's
4 advice, Mr. Liotti's advice was objectively reasonable or
5 unreasonable, is what informs the inquiry under
6 Strickland. So we've actually got it satisfied.

7 And with respect to when a hearing is required,
8 a hearing obviously is required where there is a material
9 question of fact that is going to be dispositive to the
10 Court's determination of a motion, and where that
11 material question of fact is based on two deferring or
12 two contested statements of fact.

13 In this case, the key facts that are material
14 are in Dr. Belfiore's affirmation. Mr. Liotti has
15 submitted an affirmation in which he has not disputed any
16 of that. He says in his affirmation, he never disputes
17 that he told Dr. Belfiore that he could win this. He
18 never disputes that he told Dr. Belfiore that he should
19 fire Gann. He never disputes that he told Dr. Belfiore
20 that he should go to trial.

21 And this issue that's raised by the government
22 with respect to the medical license, and Dr. Belfiore
23 potentially waiting because of the information on the
24 medical license or being unwilling to give up his medical
25 license, is really a red herring because the medical

Proceedings

1 license was going to be lost anyway.

2 If he went to trial, a reasonable attorney
3 would have told him the medical license -- to the extent
4 that that's lost upon a felony conviction, if you plead
5 guilty you're going to lose the license but you have no
6 mandatory minimum jail sentence.

7 If you don't plead guilty and go to trial,
8 you're going to lose your license and you're going to be
9 in jail for a mandatory minimum of twenty years to life.
10 That's the difference.

11 THE COURT: All right. I --

12 MS. ALDEA: So your Honor can grant a hearing
13 to directly answer your question. I'm sorry -- can grant
14 a hearing to directly answer the question but I think
15 that on this record based on the papers submitted, this
16 motion actually can be resolved, and should be granted
17 without one.

18 THE COURT: Well, again I don't agree with that
19 because we have a record here where the doctor during the
20 period he was before me, was definitely, you know,
21 suggesting that he was innocent of this, and based upon
22 what happened before me, did not appear to be in a
23 position where he would be able to plead guilty.

24 What you're suggesting to me is that no, he was
25 at a different mind set at a prior time. It was only

Proceedings

1 when Mr. Liotti came in that everything changed. So --
2 and you haven't proven that. As a matter of fact, as I
3 pointed out, Dr. Belfiore doesn't even say that in his
4 affidavit. He says he was considering a plea.

5 So he doesn't even say I was -- and I
6 understand you're talking about what's legally required
7 or not, I will look at that once I know what the facts
8 are. I don't even know what the facts are at this point.
9 You can argue to me what is or what is not sufficient but
10 we have like a black hole of information regarding why
11 that delay took place. And rather than going immediately
12 to a hearing, I don't know, you know -- that maybe
13 completely unnecessary. I am not saying I won't grant
14 the hearing but let's get Mr. Gann's affidavit. If Dr.
15 Belfiore disputes what he says occurred in those
16 conversations, what his mind set was, then if I deem it's
17 going to be material to my decision, then we would have a
18 hearing on that, at a minimum, if not on everything.

19 But I don't believe it's appropriate given we
20 haven't even heard -- in all ineffective cases, you
21 usually get a declaration before you go to a hearing,
22 just so you can understand whether a hearing is
23 necessary, and even if it isn't going to be necessary,
24 what the scope of the hearing would be.

25 So I don't see any reason why not to get his

Proceedings

1 declaration, and then you can tell me whether Dr.
2 Belfiore is disputing any part of it, okay?

3 But I don't want to do that just -- if I just
4 issue an order to Mr. Gann, he may not completely
5 understand.

6 MR. BARKET: If I may, your Honor?

7 THE COURT: Yes.

8 MR. BARKET: I mean, we -- maybe we all, but I
9 certainly know Mr. Gann quite well, and I spoke to him
10 about this, so we would be happy to provide an
11 affirmation from Mr. Gann. It was -- it's somewhat of an
12 awkward position for attorneys and Mr. Gann and I know
13 Mr. Liotti for over thirty years. So we live and work in
14 the same town almost literally.

15 So I don't want to make it sound terribly
16 incestuous but I think your Honor understands. So I
17 would be happy to go back to Mr. Gann. He knew that it
18 was possible that he would either have to provide an
19 affidavit or provide a -- testify in court about this.
20 And I'm sure he would be willing to do it when I advise
21 him about what the Court's position is.

22 THE COURT: Okay, Mr. King, that --

23 MR. KING: That's acceptable, your Honor.

24 THE COURT: All right. Again, I just want to
25 emphasize to him, I think it's clear what the issues are

Proceedings

1 but that he obviously should recount what the reasons for
2 the delay was, what Dr. Belfiore was telling him, about
3 what his willingness or his unwillingness to plead at any
4 particular time, independent of whether that would be
5 dispositive, I want to know did Dr. Belfiore at any time
6 express concerns about pleading guilty, and then very
7 importantly, especially at the tail end of the
8 relationship, what their discussions were about his
9 intent to plead or not to plead.

10 MR. BARKET: I don't -- I mean one of the
11 things I know from Mr. Gann is --

12 THE COURT: In other words, I don't want a one-
13 sentence or --

14 MR. BARKET: No, no, no.

15 THE COURT: Not a one sentence but I want it to
16 be --

17 MR. BARKET: We'll provide a detailed affidavit
18 after his review of all the transcripts and everything
19 that he would need to refresh his memory because this was
20 several years ago.

21 THE COURT: And I don't know, do you know
22 whether there was communications by email or not? Do you
23 know whether Dr. Belfiore sent Mr. Gann emails or not?

24 MR. BARKET: I don't offhand, actually, now
25 that you ask that question. I'm not sure. I haven't

Proceedings

1 seen any, so that's a --

2 THE COURT: Can you ask Mr. Gann that as well?

3 MR. BARKET: I will indeed. I think there are
4 but I am not positive of that. I just don't recall
5 seeing them.

6 THE COURT: Okay.

7 MR. BARKET: The other person that we may want
8 to -- we don't have an affidavit from is Ms. Gatz, who I
9 think that -- Mr. Gann and Ms. Gatz were discussing the
10 case off the record during this time period.

11 THE COURT: Well, let's take it one step at a
12 time. I mentioned Ms. Gatz too. She may have something
13 relevant to say but she's secondhand. So whatever she
14 will be testifying, I don't think she spoke to Dr.
15 Belfiore directly, so it would be just what Mr. Gann told
16 her.

17 So let's see what Mr. Gann says and whether or
18 not there's any disagreement between your client, and Mr.
19 Gann, and then if necessary, either at a hearing --
20 because if it's something material, and there's clearly a
21 dispute, I may decide to have a hearing, and then Ms.
22 Gatz could just testify at the hearing if it's necessary
23 but let's just take it -- I don't think this will take
24 too long, okay?

25 MR. BARKET: All right.

Proceedings

1 THE COURT: So talk to Mr. Gann. If you could
2 just send a letter to me indicating when you think he'll
3 be able to submit that by, I do want him on this question
4 of any records of communications, I assume, you know,
5 that the primary would be email but if he has any notes
6 that relate to this particular issue, I would want them -
7 - or emails of what Dr. Belfiore's state of mind was as
8 to whether to plead guilty or not during this period,
9 that they be attached to his declaration.

10 MR. BARKET: We'll do this as quickly as we
11 can. March -- would March 20th be okay?

12 THE COURT: Sure.

13 MR. BARKET: That would be three full weeks.

14 THE COURT: Yep. And then what we would do is
15 have another conference to discuss whether or not Dr.
16 Belfiore agrees with what was in there, and then whether
17 or not either further development of the record with a
18 hearing or some other affidavit from Ms. Gatz or anything
19 else, needs to -- we'll put it on -- if the 20th is the
20 date, we'll put it on for like a week later. Okay?

21 MR. KING: Your Honor, just to expedite things,
22 what we would ask, and I don't anticipate any issue with
23 this is for when Mr. Gann is called, we would like to be
24 on the call, so that we hear what is being conveyed to
25 him about what is being asked of him by the Court. So

Proceedings

1 that if there's anything we think is particularly
2 pertinent based on today's proceedings, that we would be
3 ale to ask him to submit that as well.

4 THE COURT: Sounds reasonable.

5 MR. BARKET: I'm sorry, I --

6 THE COURT: They want to join in the call where
7 you discuss with Mr. Gann what I am asking you to do. If
8 you don't agree with that, I am going to bring him in.
9 I'm going to tell him myself but --

10 MR. KING: We would just like to be on the call
11 with --

12 THE COURT: They want to have a conference
13 call --

14 MR. BARKET: I was literally going to -- I
15 mean, I know him quite well. I was literally trying to
16 text him now to see what his availability is, okay?

17 THE COURT: Okay. That's okay --

18 MR. BARKET: So --

19 THE COURT: When you are going to discuss with
20 him the parameters of what you're asking him to do, again
21 if you don't want to have Mr. King on the line for a
22 reason you don't like that --

23 MR. BARKET: No, I don't mind it.

24 THE COURT: Okay.

25 MR. BARKET: But I mean I think there's part of

Proceedings

1 this that --

2 THE COURT: Yeah.

3 MR. BARKET: -- the initial, Marc, I need you
4 to give us an affidavit.

5 THE COURT: That's fine.

6 MR. BARKET: I want to provide you this
7 information.

8 THE COURT: And just tell him that there will
9 be a conference call with the government and you, will
10 discuss with him what I am requesting.

11 MR. KING: I wasn't referring to the
12 preliminaries of setting it up. I just wanted to be
13 available so that to the extent we had things we wanted
14 him to submit or ensuring that whatever was submitted was
15 in keeping with what occurred here today.

16 MR. BARKET: Sure. Yeah, I mean --

17 THE COURT: All right.

18 MR. BARKET: -- I don't think there's any rule
19 about preventing them from reaching out to Mr. Gann
20 themselves.

21 THE COURT: No, no, I was going to suggest that
22 you just have him come in here and I would tell him
23 directly but I trust both of you to be able to convey
24 what I said. So I'm okay with that. Okay?

25 MR. KING: Your Honor, we did have one final

Proceedings

1 point that we wanted to bring out about our papers. It
2 doesn't relate to anything we said today, that's why I
3 just wanted to close with it very briefly.

4 THE COURT: Okay.

5 MR. KING: This is on the question of the jury
6 instruction. I just wanted to point out, it's not in our
7 papers but your Honor's jury instruction concerning the
8 but for cause of death is consistent with what is in
9 Judge Sand's Modern Federal Jury Instructions. That was
10 the charge that we asked for months before it was given.
11 And in addition to that, Judge Sand points out in his
12 commentary that the reason there is a line in there about
13 proximate cause not being required is because every Court
14 of Appeals have considered the issues has determined that
15 proximate cause is not required.

16 THE COURT: Yes.

17 MR. KING: So I just want to make sure that we
18 cover that before concluding today.

19 THE COURT: Okay. All right. So we'll put it
20 on for like the 27th or 28th of March?

21 MR. BARKET: We won't need anymore than a week
22 after the submission.

23 THE COURT: Yes.

24 MR. BARKET: We'll have the (indiscernible) or
25 not -- we'll have the -- sorry. We don't need anymore

Proceedings

1 than a week after the submission to get Dr. Belfiore's
2 position becuae obviously we'll have the affidavit in
3 hand --

4 THE COURT: Well, yeah.

5 MR. BARKET: -- quickly.

6 THE COURT: 28th? How about march 28th at
7 2:30?

8 MR. BARKET: That's fine. Is it okay with you?

9 MS. ALDEA: Yes, that's fine.

10 MR. KING: It works for the government, your
11 Honor.

12 THE COURT: All right. And if there's any
13 disputes or questions about the scope of the affidavit,
14 just write me a letter, and if necessary, we'll have a
15 conference before the 20th, okay? All right. Thank you
16 very much. Have a good day.

17 MR. KING: Thank you, your Honor.

18 MR. BARKET: Thank you, Judge.

19 MS. ALDEA: Thank you.

20 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 2nd day of July, 2019.


Linda Ferrara

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